90-1791

No. _____

In The

Supreme Court of the United States

October Term, 1990

THOMAS M. GERMAIN, TRUSTEE FOR THE ESTATE OF O'SULLIVAN'S FUEL OIL CO., INC.,

Respondent,

v.

THE CONNECTICUT NATIONAL BANK,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Do the Courts of Appeals have jurisdiction pursuant to 28 U.S.C. § 1292(b) (1988) over certified interlocutory orders of the District Courts affirming, modifying or reversing orders entered by the Bankruptcy Courts?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, The Connecticut National Bank ("CNB"),[1] respectfully requests that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Second Circuit. The parties are listed in the caption.

[1] Pursuant to S. Ct. R. 29.1, petitioner is a wholly owned subsidiary of Hartford National Corporation, which is a wholly owned subsidiary of Shawmut National Corporation.

DECISION BELOW

The decision of the United States Court of Appeals for the Second Circuit determining that the court lacked jurisdiction under 28 U.S.C. § 1292(b) (1988) is reported at 926 F.2d 191 (2d Cir. 1991) and is reprinted in the attached Appendix at App. 12a–28a.

JURISDICTION

The decision of the Court of Appeals for the Second Circuit sought to be reviewed by way of this petition was decided on February 15, 1991. This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1988).

CONSTITUTIONAL PROVISIONS, STATUTES, AND ORDINANCES INVOLVED

The statutes involved are reproduced in the attached Appendix at App. 1a–11a.

BASIS OF FEDERAL JURISDICTION

Jurisdiction in the Bankruptcy Court was invoked under 28 U.S.C. § 1334 (1988). Jurisdiction in the District Court was invoked under 28 U.S.C. § 158 (1988). Jurisdiction in the Court of Appeals was invoked under 28 U.S.C. § 1292 (1988), but was denied *sua sponte* under the jurisdiction of the court to determine its own jurisdiction. *See United States v. United Mine Workers of America*, 330 U.S. 258, 292 n.57 (1947).

STATEMENT OF THE CASE

BACKGROUND

In 1981, O'Sullivan's Fuel Oil Co., Inc. ("O'Sullivan's") entered into a loan agreement with First Bank, which agreement provided O'Sullivan's with a revolving line of credit of $1,000,000. As security for the money loaned to O'Sullivan's, First Bank, which later merged with The Connecticut National Bank ("CNB"), received a lien on the debtor's accounts receivable, inventory, machinery, equipment and other tangible assets. The original line of credit was subsequently reduced to $500,000, at which time the bank also agreed to a five-year term loan with the debtor in the amount of $500,000 secured by a first mortgage on the debtor's fuel storage facilities in Cromwell, Connecticut. O'Sullivan's fortunes declined, and, on January 18, 1984, it filed a voluntary petition for reorganization under Chapter 11 of the Bankruptcy Code, 11 U.S.C. §§ 1101–1146 (1988). CNB in turn filed a proof of claim. Two and one-half years later the bankruptcy court converted the Chapter 11 reorganization into a Chapter 7 liquidation, *see* 11 U.S.C. § 1112 (1988), and appointed Thomas M. Germain as Trustee for the debtor's estate.

On May 29, 1987, the Trustee commenced suit against CNB in the Superior Court for the State of Connecticut alleging that, prior to and during the course of the bankruptcy proceedings, CNB committed various tortious acts against the debtor and the debtor's estate. The counts of the Trustee's amended complaint allege (1) tortious interference; (2) coercion and duress; (3) fraudulent misrepresentation; (4) breach of an implied obligation to act

in good faith and with fair dealing; (5) violation of the Connecticut Unfair Trade Practices Act, Conn. Gen. Stat. §§ 42-110a-110o (1987 and Supp. 1991); and (6) violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968 (1988).

On July 15, 1987, the suit was removed to the bankruptcy court. On August 24, 1987, the Trustee filed in the bankruptcy court a demand for a jury trial on all of the issues raised in the amended complaint. After the district court dismissed the Trustee's RICO claim and denied his motion to withdraw the bankruptcy reference, CNB moved in the bankruptcy court on November 2, 1988 to strike the Trustee's jury demand. On September 6, 1989, the bankruptcy court denied CNB's motion to strike.

CNB appealed the decision to the district court and, alternatively, sought leave to appeal pursuant to 28 U.S.C. § 158(a) (1988). Leave to appeal was granted by the district court on November 14, 1989. The district court affirmed and thereafter certified an appeal, exercising the power granted under 28 U.S.C. § 1292(b) (1988) for district courts to certify immediate appeals of interlocutory orders to the courts of appeals. CNB sought leave to appeal as provided by the same statute and by Fed. R. App. P. 5(a). The court of appeals dismissed the petition for lack of jurisdiction under § 1292(b) (1988), holding that in this context review by the court of appeals is limited to final decisions, judgments, orders and decrees of district courts as provided under 28 U.S.C. § 158(d) (1988). *Germain v. The Connecticut National Bank*, 926 F.2d 191 (2d Cir. 1991).

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals for the Second Circuit Has Rendered a Decision in Conflict with the Decisions of Other United States Courts of Appeals on the Same Matter.

The decision below denying jurisdiction under § 1292(b) is in conflict with the decisions of other United States Courts of Appeals on the same matter. As noted by the Fourth Circuit, three views have emerged on the issue of the applicability of § 1292(b) to bankruptcy appeals, "and the circuits that have addressed this question are badly split." *Capitol Credit Plan of Tennessee, Inc. v. Shaffer*, 912 F.2d 749, 751-52 (4th Cir. 1990).

First, there is the view that 28 U.S.C. § 158(d) (1988) precludes application of § 1292(b) (1988) with regard to all appeals in bankruptcy cases. This position was initially adopted, but later abandoned by the Court of Appeals for the Ninth Circuit. *Compare Teleport Oil Co., Inc. v. Security Pacific National Bank*, 759 F.2d 1376, 1378 (9th Cir. 1985) (adopting this approach) *with In re Benny*, 791 F.2d 712, 717-20 (9th Cir. 1986) (rejecting approach taken in *Teleport*).

The second view is that § 1292(b) (1988) is available in all bankruptcy appeals. The Court of Appeals for the Seventh Circuit has repeatedly applied this approach. *See, e.g., In re Jartran, Inc.*, 886 F.2d 859, 864-65 (7th Cir. 1989); *In re Moens*, 800 F.2d 173, 176-77 (7th Cir. 1986). *See also Coastal Steel Corp. v. Tilghman Wheelabrator Ltd.*, 709 F.2d 190, 200 n.7 (3rd Cir. 1983), *cert. denied*, 464 U.S. 938 (1983) (wherein the Court of Appeals for the Third

Circuit adopted the view that § 1293 (the predecessor to § 158) did not preclude application of other appellate jurisdiction statutes, including § 1292, to bankruptcy appeals). *See generally In re Salem Mortgage Co.*, 783 F.2d 626, 632 (6th Cir. 1986) (holding that §§ 158 and 1291 are alternative jurisdictional provisions); *Teton Exploration Drilling, Inc. v. Bokum Resources Corp.*, 818 F.2d 1521, 1524 n.2 (10th Cir. 1987) (same).

The third and final view holds that § 1292(b) is available in the bankruptcy context only when the order appealed from originates in the district court; orders originating on appeals from the bankruptcy court are governed exclusively by 28 U.S.C. § 158(d) (1988). *See, e.g., Capitol Credit Plan of Tennessee, Inc. v. Shaffer*, 912 F.2d 749, 752-54 (4th Cir. 1990); *Browning v. Navarro*, 887 F.2d 553, 557 (5th Cir. 1989). The decision below adopts this third approach.

II. The Court of Appeals for the Second Circuit Has Rendered a Decision in Conflict with its Own Precedent.

As stated by the Court of Appeals for the Second Circuit below, "[o]ur cases are in disarray on the jurisdictional question." App. 16a. A discussion of the conflicting precedents is provided in the court of appeals' written opinion. *See also In re Duplan Corp.*, 591 F.2d 139, 148 (2d Cir. 1978) (under former Bankruptcy Act, suggesting § 1292(b) as appropriate vehicle for appellate review of district court order in a bankruptcy case).

A similar intra-circuit split also exists in other jurisdictions. The Fifth Circuit Court of Appeals initially adopted the position that § 158(d) precludes application

of § 1292. In *In re Barrier*, 776 F.2d 1298, 1299 (3d Cir. 1985), the Court of Appeals for the Third Circuit stated "[t]he bankruptcy appellate scheme now enacted in 28 U.S.C. § 158, which appears to be comprehensive, clearly supersedes 28 U.S.C. § 1291, covering appeals from final judgments of the district court, and would inferentially appear to supersede § 1292 as well." However, in *In re Topco, Inc.*, 894 F.2d 727, 736 (5th Cir. 1990), the Court of Appeals for the Fifth Circuit disapproved *Barrier*, holding that § 158(d) concurrently grants jurisdiction along with § 1291. *Accord In re Texas Research, Inc.*, 862 F.2d 1161, 1162 (5th Cir. 1989) (holding § 1291 available to orders of district courts reviewing bankruptcy court decisions). Switching sides once again, however, the Court of Appeals for the Fifth Circuit later ruled "§ 158 clearly supersedes 28 U.S.C. § 1291, and, by inference also supersedes section 1292." *In re Hester*, 899 F.2d 361, 365 (5th Cir. 1990). *See also Browning v. Navarro*, 887 F.2d at 557 (holding that § 1292(b) is applicable to bankruptcy orders originating in the district court). A similar divergence of authority exists within the Ninth Circuit, *see In re Benny*, 791 F.2d at 717-720 (discussing inconsistent precedents), and also possibly within the Third Circuit. *Compare Coastal Steel Corp. v. Tilghman Wheelabrator Ltd.*, 709 F.2d at 200 n.7 (suggesting § 1292 is available) with *In re Brown*, 803 F.2d 120, 122 (3d Cir. 1986) (suggesting in dicta that § 158 is exclusive).

Accordingly, not only is there disagreement between the circuits, there is also sharp disagreement within the circuits as well.

III. The Court Below Has Decided an Important Question of Federal Law Which Has Not Been, But Should Be, Settled by This Court.

The question decided by the Court of Appeals for the Second Circuit is an important question of federal law which has not been, but should be, settled by this Court. Since the matter involves the jurisdiction of the federal appellate courts, it also implicates the jurisdiction of this Court. If a broad category of bankruptcy appeals is to be unreviewable by this Court, it seems appropriate for this Court to decide the issue, particularly where the Courts of Appeals disagree among themselves.

Further, a significant number of courts have addressed the issue. Given the ample consideration provided to date on the question, it now appears ripe for resolution.

IV. The Court of Appeals Has Decided a Federal Question in a Way That Conflicts with Applicable Decisions of This Court.

The Court of Appeals for the Second Circuit has decided a federal question in a way that conflicts with applicable decisions of this Court. The court of appeals reasoned that § 1292 is implicitly "repealed" with regard to interlocutory decisions of bankruptcy courts appealed through the district courts. Such an approach runs counter to the rule that statutes capable of co-existence are, whenever possible, to each be given effect. *See Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 155 (1976); *Morton v. Mancari*, 417 U.S. 535, 551 (1974); *U.S. v. Borden Co.*, 308 U.S. 188, 198 (1939). Such an approach also runs counter to the rule disfavoring implicit repeals when a legislative intent to repeal is not "clear and manifest." *See*

Rodriguez v. United States, 480 U.S. 522, 524 (1987); *Radzanower, supra*, 426 U.S. at 154; *Borden, supra*, 308 U.S. at 198; *Red Rock v. Henry*, 106 U.S. 596, 602 (1883). As noted by the Court of Appeals for the Seventh Circuit, there is nothing in either the text of 28 U.S.C. § 158(d) (1988) or its legislative history that demonstrates that Congress intended the outcome reached by the court below. *In re Moens*, 800 F.2d 173, 177 (7th Cir. 1986).

CONCLUSION

For the foregoing reasons, it is respectfully requested that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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May 16, 1991

No. _____

In The

Supreme Court of the United States

October Term, 1990

THOMAS M. GERMAIN, TRUSTEE FOR THE ESTATE OF O'SULLIVAN'S FUEL OIL CO., INC.,

Respondent,

v.

THE CONNECTICUT NATIONAL BANK,

Petitioner.

APPENDIX

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28 U.S.C. § 151 (1988)

§ 151. Designation of bankruptcy courts

In each judicial district, the bankruptcy judges in regular active service shall constitute a unit of the district court to be known as the bankruptcy court for that district. Each bankruptcy judge, as a judicial officer of the district court, may exercise the authority conferred under this chapter with respect to any action, suit, or proceeding and may preside alone and hold a regular or special session of the court, except as otherwise provided by law or by rule or order of the district court (Added Pub.L. 98-353, Title I, § 104(a), July 10, 1984, 98 Stat. 336.)

28 U.S.C. § 157 (1988)

§ 157. Procedures

(a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.

(b)(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.

(2) Core proceedings include, but are not limited to –

(A) matters concerning the administration of the estate;

(B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12, or 13 of title 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11;

(C) counterclaims by the estate against persons filing claims against the estate;

(D) orders in respect to obtaining credit;

(E) orders to turn over property of the estate;

(F) proceedings to determine, avoid, or recover preferences;

(G) motions to terminate, annul, or modify the automatic stay;

(H) proceedings to determine, avoid, or recover fraudulent conveyances;

(I) determinations as to the dischargeability of particular debts;

(J) objections to discharges;

(K) determinations of the validity, extent, or priority of liens;

(L) confirmations of plans;

(M) orders approving the use or lease of property, including the use of cash collateral;

(N) orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate; and

(O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims.

(3) The bankruptcy judge shall determine, on the judge's own motion or on timely motion of a party, whether a proceeding is a core proceeding under this subsection or is a proceeding that is otherwise related to a case under title 11. A determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law.

(4) Non-core proceedings under section 157(b)(2)(B) of title 28, United States Code, shall not be subject to the mandatory abstention provisions of section 1334(c)(2).

(5) The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

(c)(1) A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after

considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.

(2) Notwithstanding the provisions of paragraph (1) of this subsection, the district court, with the consent of all the parties to the proceeding, may refer a proceedings related to a case under title 11 to a bankruptcy judge to hear and determine and to enter appropriate orders and judgments, subject to review under section 158 of this title.

(d) The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown. The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.

(Added Pub.L. 98-353, Title I, § 104(a), July 10, 1984, 98 Stat. 340, and amended Pub.L. 99-554, Title I, §§ 143, 144(b), Oct. 27, 1986, 100 Stat. 3096.)

28 U.S.C. § 158 (1988)

§ 158. Appeals

(a) The district courts of the United States shall have jurisdiction to hear appeals from final judgments, orders, and decrees, and, with leave of the court, from interlocutory orders and decrees, of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges

under section 157 of this title. An appeal under this subsection shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving.

(b)(1) The judicial council of a circuit may establish a bankruptcy appellate panel, comprised of bankruptcy judges from districts within the circuit, to hear and determine, upon the consent of all the parties, appeals under section (a) of this section.

(2) If authorized by the Judicial Conference of the United States, the judicial councils of 2 or more circuits may establish a joint bankruptcy appellate panel comprised of bankruptcy judges from the districts within the circuits for which such panel is established, to hear and determine, upon the consent of all the parties, appeals under subsection (a) of this section.

(3) No appeal may be referred to a panel under this subsection unless the district judges for the district, by majority vote, authorize such referral of appeals originating within the district.

(4) A panel established under this section shall consist of three bankruptcy judges, provided a bankruptcy judge may not hear an appeal originating within a district for which the judge is appointed or designated under section 152 of this title.

(c) An appeal under subsections (a) and (b) of this section shall be taken in the same manner as appeals in civil proceedings generally are taken to the courts of appeals from the district courts and in the time provided by Rule 8002 of the Bankruptcy Rules.

(d) The courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered under subsections (a) and (b) of this section.

(Added Pub.L. 98-353, Title I, § 104(a), July 10, 1984, 98 Stat. 341, and amended Pub.L. 101-650, Title III, § 305, Dec. 1, 1990, 104 Stat. 5105.)

28 U.S.C. § 1292 (1988)

§ 1292. Interlocutory decisions

(a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the

parties to admiralty cases in which appeals from final decrees are allowed.

[(4) Repealed. Pub.L. 97-164, Title I, § 125(a)(3), Apr. 2, 1982, 96 Stat. 36]

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

(c) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction –

(1) of an appeal from an interlocutory order or decree described in subsection (a) or (b) of this section in any case over which the court would have jurisdiction of an appeal under section 1295 of this title; and

(2) of an appeal from a judgment in a civil action for patent infringement which would otherwise be appealable to the United States Court of Appeals for the Federal Circuit and is final except for an accounting.

(d)(1) When the chief judge of the Court of International Trade issues an order under the provisions of section 256(b) of this title, or when any judge of the Court of International Trade, in issuing any other interlocutory order, includes in the order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals for the Federal Circuit may, in its discretion, permit an appeal to be taken from such order, if application is made to that Court within ten days after the entry of such order.

(2) When any judge of the United States Claims Court, in issuing an interlocutory order, includes in the order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals for the Federal Circuit may, in its discretion, permit an appeal to be taken from such order, if application is made to that Court within ten days after the entry of such order.

(3) Neither the application for nor the granting of an appeal under this subsection shall stay proceedings in the Court of International Trade or in the Claims Court, as the case may be, unless a stay is ordered by a judge of the Court of International Trade or of the Claims Court or by the United States Court of Appeals for the Federal Circuit or a judge of that court.

(4)(A) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction of an appeal from an interlocutory order of a district court of the United States, the District Court of Guam, the District Court of the Virgin Islands, or the District Court for the Northern Mariana Islands, granting or denying, in whole or in part, a motion to transfer an action to the United States Claims Court under section 1631 of this title.

(B) When a motion to transfer an action to the Claims Court is filed in a district court, no further proceedings shall be taken in the district court until 60 days after the court has ruled upon the motion. If an appeal is taken from the district court's grant or denial of the motion, proceedings shall be further stayed until the appeal has been decided by the Court of Appeals for the Federal Circuit. The stay of proceedings in the district court shall not bar the granting of preliminary or injunctive relief, where appropriate and where expedition is reasonably necessary. However, during the period in which proceedings are stayed as provided in this subparagraph, no transfer to the Claims Court pursuant to the motion shall be carried out.

(As amended Apr. 2, 1982, Pub.L. 97-164, Title I, § 125, 96 Stat. 36; Nov. 8, 1984, Pub.L. 98-620, Title IV, § 412, 98 Stat. 3362; Nov. 19, 1988, Pub.L. 100-702, Title V, § 501, 102 Stat. 4652.)

28 U.S.C. § 1334 (1988)

§ 1334. Bankruptcy cases and proceedings

(a) Except as provided in subsection (b) of this section, the district court shall have original and exclusive jurisdiction of all cases under title 11.

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

(c)(1) Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

(2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction. Any decision to abstain or not to abstain made under this subsection is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title. This subsection shall not be construed to limit the applicability of the stay provided for by section 362 of title 11, United States Code, as such section applies to an action affecting the property of the estate in bankruptcy.

(d) The district court in which a case under title 11 is commenced or is pending shall have exclusive juris-

diction of all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate.

(As amended July 10, 1984, Pub.L. 98-353, Title I, § 101(a), 98 Stat. 333; Pub.L. 99-554, Title I, § 144(e), Oct. 27, 1986, 100 Stat. 3096; Dec. 1, 1990, Pub.L. 101-650, Title III, § 309(b), 104 Stat. 5113.)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 1989

(Submitted July 17, 1990 Decided: February 15, 1991)

Docket No. 90-8054

THOMAS M. GERMAIN,
TRUSTEE FOR THE ESTATE
OF O'SULLIVAN'S FUEL OIL
CO., INC.,
Plaintiff-Respondent,

v.

THE CONNECTICUT
NATIONAL BANK,
Defendant-Petitioner.

Before: WINTER, MAHONEY and WALKER,
Circuit Judges.

Petitioner seeks leave to appeal from a district court order affirming an interlocutory order of the bankruptcy court. We hold that we have no jurisdiction and dismiss the petition.

Thomas M. Germain, Hartford, Connecticut,
for Plaintiff-Respondent.

G. Eric Brunstad, Hartford, Connecticut
(Janet C. Hall, Robinson & Cole,
Hartford, Connecticut, of counsel),
for Defendant-Petitioner.

WINTER, *Circuit Judge:*

This petition for leave to appeal raises the question of whether we have appellate jurisdiction under 28 U.S.C. § 1292(b) to review a district court order affirming an interlocutory order entered by the bankruptcy court. This issue turns on whether 28 U.S.C. § 158(d) precludes by negative implication interlocutory review under Section 1292. We conclude that it does and dismiss the petition.

BACKGROUND

In 1981, O'Sullivan's Fuel Oil Co., Inc. ("O'Sullivan") borrowed $500,000 from First Bank. As security, First Bank, which later merged with The Connecticut National Bank ("CNB"), received a mortgage lien on O'Sullivan's fuel oil facility. O'Sullivan's fortunes declined, and, on January 18, 1984, it filed a voluntary petition for reorganization under Chapter 11 of the Bankruptcy Code, 11 U.S.C. §§ 1101-74 (1988). CNB in turn filed a proof of claim. Two and one-half years later the bankruptcy court converted the Chapter 11 reorganization into a Chapter 7 liquidation, *see* 11 U.S.C. §§ 701-66 (1988), and appointed Thomas M. Germain as Trustee for the debtor's estate.

On June 1, 1987, Germain, as Trustee, commenced an action against CNB in a Connecticut state court. The suit alleged that beginning in November 1983, roughly two months before O'Sullivan filed for bankruptcy protection, First Bank attempted to assume control of the company by demanding *inter alia* that O'Sullivan surrender control of the business and its assets to an individual of the Bank's choosing, that O'Sullivan file a Chapter 11 proceeding utilizing a law firm selected by the Bank, and that

O'Sullivan replace its insurance agency. Based on these and subsequent alleged efforts to assert control, the Trustee sought damages based on various claims sounding in tort and contract, a claim under the Connecticut Unfair Trade Practices Act, Conn. Gen. Stat. Ann. §§ 42-110a to 110q (West 1987 & Supp. 1990), and, of course, a claim under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-68 (1988).

CNB removed the action to bankruptcy court, whereupon the Trustee filed a demand for a jury trial and moved to withdraw the bankruptcy court's reference. After the district court dismissed the Trustee's RICO claim and denied his motion to withdraw the bankruptcy reference, CNB moved before the bankruptcy court to strike the Trustee's jury demand. The bankruptcy court denied CNB's motion on the ground that the Trustee was seeking money damages based on tort and contract claims and thus was entitled to a jury trial. CNB sought leave to appeal to the district court which was granted pursuant to 28 U.S.C. § 158(a). The district court affirmed and thereafter certified an interlocutory appeal under 28 U.S.C. § 1292(b). CNB seeks leave to appeal as provided by Fed. R. App. P. 5(a).

DISCUSSION

Appellate jurisdiction over bankruptcy court decisions exists in district courts pursuant to 28 U.S.C. § 158(a)[1] or in bankruptcy appellate panels in circuits where such a panel has been established under Section 158(b).[2] Section 158(d) provides for review by courts of appeals of "final" orders of a district court or bankruptcy panel.[3] Because

Section 158(d) does not provide for court of appeals jurisdiction over interlocutory orders of a district court reviewing an order of a bankruptcy court, CNB seeks to invoke our jurisdiction under 28 U.S.C. § 1292(b).[4]

Although both parties appear desirous of our hearing the appeal, we *sua sponte* address the question whether Section 158(d) precludes by negative implication appellate jurisdiction under Section 1292(b) of interlocutory decisions rendered under Section 158(a). This issue is not without difficulty. Unless Section 158(d) provides the exclusive means of court of appeals review of orders entered under Subsection (a), it is arguably superfluous because courts of appeals already have appellate jurisdiction under 28 U.S.C. § 1291 over final decisions of district courts. If Section 158(d) is exclusive, of course, then we have no jurisdiction under Section 1292(b).

However, reading Section 158(d) as the exclusive basis for appellate jurisdiction creates an anomaly in that a district court may withdraw any matter from the bankruptcy court under 28 U.S.C. § 157(d), and its decisions are thereafter reviewable under Sections 1291 and 1292. *See In re Sonnax Industries, Inc.*, 907 F.2d 1280, 1282-83 (2d Cir. 1990). If Section 158(d) is exclusive, then interlocutory orders entered by district courts that have withdrawn a case under Section 157(d) would be reviewable, if injunctive in nature, under Section 1292(a)(1) or, if not injunctive, upon certification under Section 1292(b), while identical interlocutory orders entered under Section 158(a) would be unreviewable. It is tempting, therefore, to say that interlocutory orders entered under Section 158(a) are reviewable under Section 1292. However, that may create

a new anomaly. Section 158(d) provides appellate jurisdiction for final orders entered under Subsections (a) and (b). Subsection (b) provides for the creation and operation of appellate panels of bankruptcy judges, and, arguably, it would overly stretch Section 1292 to hold that an order entered by such an appellate panel under Subsection 158(b) might be subject to review as an interlocutory injunction under Section 1292(a)(1) or discretionary review after certification under Section 1292(b).

Our cases are in disarray on the jurisdictional question. In *In re Johns-Manville Corp.*, 824 F.2d 176 (2d Cir. 1987), we held that the district court's affirmance of an order denying a request for appointment of a shareholders' committee was non-final within the meaning of Section 158(d). In doing so, we relied on the view that the law provides

> adequate avenues of immediate appellate review for denial of motions to appoint shareholder committees without automatic, immediate access to the courts of appeals during the pendency of a bankruptcy proceeding. Under 28 U.S.C. § 158(a), district courts are authorized to review interlocutory orders of the bankruptcy courts. Moreover, district courts may certify for appeal to the courts of appeals any interlocutory order meeting the statutory criteria of 28 U.S.C. § 1292(b).

Id. at 180. Our next brush with this issue was *LTV Corp. v. Farragher (In re Chateaugay Corp.)*, 838 F.2d 59 (2d Cir. 1988). That case involved Section 1292(a)(1) rather than Section 1292(b), but we perceive no principled grounds for distinguishing between these subsections for purposes of determining our appellate jurisdiction. *LTV* held that

we lacked jurisdiction to hear an appeal from a district court's vacating and remanding an injunctive order entered by the bankruptcy court for entry of a new order. In doing so, *LTV* stated:

> Nor are we persuaded by the argument . . . that sections 1291 and 1292 of Title 28 (allowing appeals from district court final decisions and certain interlocutory orders, 28 U.S.C. §§ 1291, 1292) provide jurisdiction in this case. The order . . . is not final as required by section 1291, and, while we have recognized the applicability of section 1292 to determinations made by a district court sitting in bankruptcy, *see In re Feit & Drexler, Inc.*, 760 F.2d 406, 411-13 (2d Cir. 1985), we believe that section 158(d) remains the exclusive basis for jurisdiction for decisions entered under paragraphs (a) and (c) of section 158. . . . Therefore, our finding that the district court's decision was not final requires us to conclude that we have no authority to hear this action under section 158(d).

Id. at 62-63. *LTV* made no mention of *Johns-Manville*, although the pertinent language in *LTV* is, in contrast to the language in *Johns-Manville*, clearly a holding.

LTV, however, appears never to have been cited for that holding, perhaps because the West Publishing Co. did not accord a headnote to it. The next year, *NLRB v. Goodman*, 873 F.2d 598 (2d Cir. 1989), held to the contrary without referring to *LTV*. In that case, we reviewed a district court's remand of an issue that was related to an interlocutory injunction. We held:

> Ordinarily, a remand to the bankruptcy court by a district court is not a final, appealable order under 28 U.S.C. § 158(d) (1982), unless the remand effec-

> tively settles an issue and orders the bankruptcy court to perform merely a ministerial task. *See In re Vecko, Inc.*, 792 F.2d 744 (8th Cir. 1986); *In re Fox*, 762 F.2d 54 (7th Cir. 1985). In this case, however, the Bankruptcy Court effectively enjoined the Labor Board from proceeding against Goodman and [another party]. The District Court's order, although remanding a substantive issue for reconsideration by the Bankruptcy Court, refused to dissolve the injunction. The order is therefore appealable under 28 U.S.C. § 1292(a)(1) (1982).

Id. at 601-02. Since then, in *New York State Department of Taxation and Finance v. Hackeling (In re Luis Elec. Contracting Corp.)*, 917 F.2d 713, 716-17 (2d Cir. 1990), we have exercised appellate jurisdiction, without addressing the issue, over an interlocutory injunction issued by a bankruptcy court and affirmed by a district court.

The disarray of our decisions is matched by similar disagreements among the circuits, which are amply described in *Capitol Credit Plan of Tennessee, Inc. v. Shaffer*, 912 F.2d 749 (4th Cir. 1990), and need not be detailed here. Although *Goodman* appears to be our latest holding on this matter, we address the issue *de novo* and have circulated this opinion to the active members of the court. *See United States v. Reed*, 773 F.2d 477, 478 (2d Cir. 1985).

We conclude that Section 1292(b) does not provide jurisdiction in the instant matter. To be sure, nothing in Section 158(d) expressly negates jurisdiction. That provision simply does not mention interiocutory appeals. The fact that it would appear to be superfluous if not our exclusive source of our jurisdiction does, however, imply that it is exclusive. More importantly, the legislative history

of Section 158(d) indicates that Congress intended to limit court of appeals jurisdiction over decisions of bankruptcy courts to final decisions.

Section 158(d)'s predecessor was 28 U.S.C. § 1293(b), which differed in language but not in substance. *See* Bankruptcy Reform Act of 1978, Pub.L. No. 95-598, § 236(a), 92 Stat. 2549, 2667. Although enacted in 1978, Section 1293(b)'s effective date was in 1984. *See id.* at § 402(b), 92 Stat. 2549, 2682. Before it became effective, Section 158(d) was passed, apparently as a substitute for Section 1293(b). *See* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub.L. No. 98-353, § 104, 98 Stat. 333, 341. Most of the pertinent legislative history, therefore, is in the Bankruptcy Act of 1978.

The course of events in Congress leading to passage of Section 1293(b) appears to have been as follows. The bill passed by the House, H.R. 8200, would have conferred Article III status upon bankruptcy judges and would have treated bankruptcy courts as on a par with district courts. It thus would have eliminated the longstanding practice of appellate review of bankruptcy court decisions by district courts and would have amended Section 1291 to provide for direct appellate review of bankruptcy decisions by courts of appeals. It similarly would have amended Section 1292 to provide for direct appeals from interlocutory orders of bankruptcy courts in the case of injunctions or certified questions. H.R. 8200, 95th Cong., 2d Sess., 124 Cong. Rec. 1786 (Feb. 1, 1978) (setting forth sections 237-39 of bill); *id.* at 1804 (passage of bill). That the implications of this were fully understood is made clear by the discussion in the relevant House Report concerning

these provisions and in particular their impact on the caseload of the courts of appeals. H.R. Rep. No. 595, 95th Cong., 2d Sess. 40-43, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 6001-04.

The Senate bill, S. 2266, as reported out by the Judiciary Committee, did not confer Article III status on bankruptcy judges and would have continued the practice of appeals to the district courts. It contained no explicit provision for subsequent review by the courts of appeals. The Senate Judiciary Committee Report did contain the puzzling statement that "[a]ppeals may be taken by writ of certiorari from the district court to the United States court of appeals . . . 28 U.S.C. § 1291." S. Rep. No. 989, 95th Cong., 2d Sess. 18, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 5804. There was, however, no provision in S. 2266 establishing a certiorari procedure, and the Report's remark may well have reflected a misunderstanding of Section 1291. In any event, on the Senate floor, the text of S. 2266 was substituted for the text of H.R. 8200. 124 Cong. Rec. 28284 (Sept. 7, 1978).[5] When this substitution was made, the provisions of S. 2266 relevant to the instant matter were as reported out of the Judiciary Committee.

Although the House and Senate versions of H.R. 8200 differed, no conference was held. Instead, on September 28, the House voted to accept the Senate version of H.R. 8200 subject to further amendments. 124 Cong. Rec. 32350, 32420 (Sept. 28, 1978). In accepting the Senate version, the House abandoned the original provisions of H.R. 8200 that had amended Sections 1291 and 1292 to allow direct appeals from final and interlocutory orders of bankruptcy courts to courts of appeals. However, the House also added amendments to the substitute, three of which are pertinent to the instant matter. First, it created a new Section 1293 in Title 28 that provided for court of appeals jurisdiction over final decisions of the new bankruptcy panels and court of appeals jurisdiction over final decisions of bankruptcy courts if the parties agreed to such a direct appeal. 124 Cong. Rec. 32385 (Sept. 28, 1978). Second, Section 1334 of Title 28 was amended to provide for appellate review by district courts of final orders of bankruptcy courts and district court review of interlocutory orders of bankruptcy courts but only by leave of the district court. *Id.* Third, it provided for review of final decisions and interlocutory decisions (again upon leave) of bankruptcy courts by appellate bankruptcy panels in a new 28 U.S.C. § 1482. *Id.* at 32386. None of the September 28 amendments addressed court of appeals jurisdiction over decisions of district courts reviewing decisions of bankruptcy courts.

The action then returned to the Senate. The Senate concurred in the House's amendments, but added yet further amendments of its own. 124 Cong. Rec. 33989-34019 (Oct. 5, 1978). One of the October 5 Senate amendments added language to the new Section 1293(b) that was in substance what is now provided by Section 158(d), namely court of appeals jurisdiction over "final" decisions of district courts reviewing a bankruptcy court. *Id.* at 33991. The House then adopted the Senate amendments. 124 Cong. Rec. 34143 (Oct. 6, 1978).

In 1984, Congress adopted with only cosmetic changes the scheme of the 1978 Act concerning appellate review.

Section 158(a) provided for district court review of final bankruptcy court orders and district court review of interlocutory bankruptcy court decisions by leave of the district court. Section 158(d) provided for court of appeals review of final decisions of a district court reviewing decisions of a bankruptcy court. The only further wrinkle occurred when Congress added the procedure for district court withdrawal of a matter from the bankruptcy court. 28 U.S.C. § 157(d). No appellate procedures were provided for decisions in withdrawn cases, and Sections 1291 and 1292 are applicable in light of the fact that withdrawn cases are within the original jurisdiction of district courts. *See In re Sonnax Industries, Inc.*, 907 F.2d 1280, 1282-83 (2d Cir. 1990).

Some of the confusion concerning Section 158(d) may have arisen from the complexity of the interplay between the two houses of the Congress and the lack of commentary on issues concerning court of appeals jurisdiction during proceedings on the floor. The House Committee Report, as noted, contained an explicit discussion of the issue. The Senate Report, as also noted, was more enigmatic and perhaps reflected a misunderstanding of appellate jurisdiction as it existed at the time. Although major changes occurred thereafter, including deletion of the provisions of H.R. 8200 that would have authorized review under Sections 1291 and 1292, there was no commentary on the floor of either House regarding these changes, and the lack of a conference eliminated whatever light might have been shed by a conference report.

Nevertheless, this is a case of actions speaking louder than words, and the events described above reflect a

deliberate congressional intent to limit court of appeals jurisdiction over bankruptcy decisions. The interplay between the House and Senate was conscious and informed as each responded to changes proposed by the other. The original bill passed by the House gave to the courts of appeals direct appellate jurisdiction over bankruptcy courts by appropriate amendments to Sections 1291 and 1292. When the Senate chose to continue appellate jurisdiction in district courts, the House acceded by deleting the proposed amendments to Sections 1291 and 1292 and substituting provisions for appellate review by district courts of final bankruptcy court decisions and of interlocutory bankruptcy court decisions upon leave of the district court. The House did not include in this amended version any explicit provision for court of appeals review of either final or interlocutory decisions of district courts reviewing decisions of bankruptcy courts. Although final decisions might be reviewable under Section 1291, review of interlocutory decisions would have been severely limited because such review would appear to have been limited to cases in which the district court had already granted leave. In those circumstances, the Senate's subsequent addition of the substance of Section 158(d) providing for court of appeals review of final decisions of district courts reviewing bankruptcy decisions strongly indicates that court of appeals jurisdiction was intended to be limited to review of such final decisions.

The creation of the withdrawal procedure in 1984, however, created an apparently unnoticed anomaly. If Section 158(d) precludes court of appeals review of interlocutory decisions of bankruptcy courts, including injunc-

tions, Supreme Court review also will be barred. In such circumstances, interlocutory bankruptcy decisions by district courts, including injunctions, acting in their original jurisdiction after a withdrawal of referral under Section 157(d), would be subject to review by a court of appeals and by the Supreme Court. However, an interlocutory decision by a bankruptcy court, involving the identical legal issue, would be subject only to discretionary review by district courts. No further review would be available. Court of appeals and Supreme Court jurisdiction would thus depend entirely on whether the district court had maneuvered the appeal into the proper procedural posture. A district court desiring to make appellate review available under Section 1292 could withdraw the bankruptcy court's reference and reaffirm that court's interlocutory order. A district court wishing to avoid such review could do so by not withdrawing reference to the bankruptcy court.

We are unpersuaded, however, that this anomaly is cause to treat Section 158(d) as superfluous and to ignore its history. First, the history detailed above indicates that in 1978 Congress intended to eliminate court of appeals jurisdiction over interlocutory orders of bankruptcy courts. The oversight, if any, occurred in 1984 when the withdrawal procedure was introduced, subjecting interlocutory decisions of district courts in withdrawn cases to review under Section 1292.

Second, the anomaly is not fatally serious. Even if review of an interlocutory district court decision in a non-withdrawn case was available under Section 1292(b), that review could be avoided by a district court's declining to

grant leave under Section 158(a). Moreover, whether Section 1292 can be stretched to include review of interlocutory decisions of bankruptcy panels seems at least in doubt. Finally, there is rough, if not complete, symmetry in limiting interlocutory appeals to: (i) discretionary review by the district court under section 158(a) in non-withdrawn cases, and (ii) court of appeals review of interlocutory decisions in withdrawn cases under Section 1292.

The Third Circuit has strongly argued against giving force to the negative implication of Section 158(d) and stated in *Coastal Steel Corp. v. Tilghman Wheelabrator Ltd.*, 709 F.2d 190, 200 n.7 (3d Cir.), *cert. denied*, 464 U.S. 938 (1983):

> Given the enormity of the change in law which would bar all court of appeals and Supreme Court review of interlocutory orders in bankruptcy cases, and the complete absence of discussion of such a change [in the legislative record], we are not ready to assume without critical analysis that those courts which have held such review to be barred are correct.

Thus, if Section 158(d) precludes interlocutory review under Section 1292, "the bankruptcy courts have been given pendente lite powers, subject only to district court review, equivalent to those exercised by the federal circuit courts prior to the passage of the Evarts Act in 1891." *Coastal Steel*, 709 F.2d at 199.

We by no means suggest that these arguments lack force as policy statements. Indeed, it might also be argued that the result we reach is not consistent with the canon

of construction disfavoring repeals by implication. Such an argument, however, ignores the fact that Section 1291 is clearly "repealed" with regard to all interlocutory decisions of bankruptcy courts except for those for which leave to appeal is granted by a district court under Section 158(a). The "repeal" we infer from Section 158(d) is thus part of a far greater explicit repeal. The canon disfavoring interpretations that render statutory language superfluous – as would be the fate of Section 158(d) were we to adopt a different result – would thus seem to prevail. Canons aside, we have concluded that Congress made a deliberate and informed policy decision that is binding upon us. This conclusion is in accord with the weight of opinion in other circuits. *See Capitol Credit Plan of Tenn., Inc. v. Shaffer,* 912 F.2d 749, 754 (4th Cir. 1990) (§ 1292(b) inapplicable); *In re Atencio,* 913 F.2d 814, 816 (10th Cir. 1990) (§ 1292(a) inapplicable); *In re Kaiser Steel Corp. (Kaiser Steel Corp. v. Frates),* 911 F.2d 380, 386 (10th Cir. 1990) (§ 1292(b)); *In re Hester (Hester v. NCNB Tex. Nat'l Bank),* 899 F.2d 361, 365 (5th Cir. 1990) (§ 1292(a)); *In re First South Sav. Ass'n,* 820 F.2d 700, 708-09 (5th Cir. 1987) (§ 1292(a)); *In re Teleport Oil Co. (Teleport Oil Co. v. Security Pac. Nat'l Bank),* 759 F.2d 1376 (9th Cir. 1985) (§ 1292(a)). *But see In re Jartran Inc.,* 886 F.2d 859, 865 (7th Cir. 1989) (§ 1292(b)).

Dismissed.

ENDNOTES

[1] Section 158(a) reads:

> The district courts of the United States shall have jurisdiction to hear appeals from final judgments, orders, and decrees, and, with leave of the court, from interlocutory orders and decrees, of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title. An appeal under this subsection shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving.

28 U.S.C. § 158(a) (1988).

[2] Section 158(b) reads in pertinent part:

> (1) The judicial council of a circuit may establish a bankruptcy appellate panel, comprised of bankruptcy judges from districts within the circuit, to hear and determine, upon the consent of all the parties, appeals under subsection (a) of this section.
>
> (2) No appeal may be referred to a panel under this subsection unless the district judges for the district, by majority vote, authorize such referral of appeals originating within the district.

28 U.S.C. § 158(b) (1988).

[3] Section 158(d) reads:

> The courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered under subsections (a) and (b) of this section.

28 U.S.C. § 158(d) (1988).

[4] Section 1292(b) reads, in pertinent part:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal

from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order. . . .

28 U.S.C. § 1292(b) (1988).

[5] Two weeks later, Senator Byrd requested and received unanimous consent to vitiate the passage of H. R. 8200 and offer an amendment in the nature of a substitute deleting certain references to federal taxes and certain provisions that amended the federal tax laws. 124 Cong. Rec. 30960 (Sept. 22, 1978). However, that detour has no bearing on the jurisdictional amendments here pertinent.